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Supreme Court of the United States

OCTOBER TERM, 1961

No. 738

MELVILLE HARRIS, as Trustee in Bankruptcy of LEONARD MASSELLO and WILLIAM MASSELLO,

Petitioner,

v.

STANDARD ACCIDENT AND INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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March 22, 1962.

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the District Court (App. to Petition, p. 21) is reported at 191 F. Supp. 538. The opinion of the Court of Appeals for the Second Circuit, and the dissenting opinion (App. pp. 36, 54) are reported at 297 F. 2d 627. Typographical errors appearing in the slip sheet opinion of the Court of Appeals have been corrected in the official report. At page 49 of the Appendix to the Petition, the word "not" should be deleted from the last sentence of the text of the opinion as there reported (cf. 297 F. 2d, at pp 634-35).

Jurisdiction

The judgment of the Court of Appeals was entered on December 6, 1961. The petition for a writ of certiorari was filed on February 21, 1962. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

In the exercise of its discretionary appellate jurisdiction shall this Court grant its writ of certiorari to review the determination of the Court of Appeals on an issue controlled by New York State's law of damages when:

(a) the Court of Appeals' determination is not an obviously incorrect application of New York law, but on the contrary is entirely in accord with it;

(b) the Court of Appeals' holding that petitioner proved no damages allowed by local law made it unnecessary to decide the substantial issue of respondent's liability under New York law, so that the main issue of local law in the case comes here unanswered by the federal appellate court in the locale; and

(c) no issue of federal law arises and none was even intimated until 30 days ago when, understandably, petitioner tried in his petition to "federalize" the damage issue (but not the liability question) in order to magnify his title to review by this Court?

Statutes Involved

There are no federal statutes involved. The Bankruptcy Act, implicated only by petitioner's mention and not by his argument (Pet. 3, 6, 14), plays no role in the issue at bar. The fact that the competence of the courts below to hear the action rests upon petitioner's status as a bank-

ruptcy trustee does not bring federal law into play. It merely gave petitioner the choice to lodge his action in a federal court.

The claim of liability which petitioner asserted derives solely from the substantive tort law of New York State. The issue of damages depends upon the same source. Local New York law created the right, if any; and measures the damages, if any.

Statement of the Case

The facts appear in the opinions of the Court of Appeals and the District Court. Respondent is not able to concur in petitioner's statement of the case.

Respondent, Standard Accident and Insurance Company, issued an automobile liability insurance policy to Leonard Massello with a limit of liability of $10,000 for one person injured in any one accident. On January 5, 1952, the named insured's brother, while driving a panel truck owned by the insured, collided with a taxicab in Yonkers, New York. The taxicab careened onto the sidewalk where it struck a pedestrian, Mrs. Elizabeth Pease Van Suetendael, inflicting serious injuries.

Mrs. Van Suetendael sued the owners and drivers of both vehicles in the New York Supreme Court—in all, five defendants. Standard assumed the defense on behalf of the Massellos, and Travelers Insurance Co. did the same for the taxicab defendants.

Settlement discussions were had both before and during the trial but no settlement was reached and the trial, in March 1957, resulted in a jury verdict of $105,000 for Mrs. Van Suetendael. Standard paid the limit of its policy, $10,000, to Mrs. Van Suetendael; Travelers paid its limit of $5,000 on behalf of the taxicab defendants and the taxicab owner paid an additional $1,000. To collect the unpaid

"excess judgment" of $89,000 the present action was brought against respondent by Melville Harris, Esq., one of Mrs. Van Suetendael's attorneys, in the capacity of trustee in bankruptcy for the Massellos.

Months before the trial of the Van Suetendael case, the Massellos were insolvent; their two businesses had been sold by the Yonkers City Marshal at the request of creditors. There were, after the sale, unpaid debts owed by the Massellos amounting to more than $12,000 against total assets of $200. In 1957, subsequent both to the sale of their businesses and the entry of the personal injury judgment, the Massellos filed a petition in bankruptcy and were adjudicated bankrupts. Contrary to petitioner's repeated assertion, neither the District Court nor the Court of Appeals found that the excess judgment "forced them to go into bankruptcy" (Pet. 8, 10, 12).

On November 17, 1958 the Massellos were discharged in bankruptcy. The bankruptcy proceedings remained open pending the outcome of this action.

Although petitioner lodged his suit on the basis of diversity of citizenship, the court below ruled that jurisdiction is founded upon Section 23(b) of the Bankruptcy Act, 11 U.S.C. § 46 (b). The requisite consent of the defendant to the suit was inferred by the court below from respondent's argument of the merits without objection to jurisdiction.

The District Court, after a non-jury trial, awarded the trustee $89,000 upon the theory advanced by the trustee, namely, that respondent's refusal to settle the Van Suetendael action was in bad faith. The District Court stated that such theory of liability is "recognized in New York" (App. p. 22). The District Court did not again advert to New York law other than to state (App. p. 33) that New York had, apparently, not yet adopted any rule on the question of damages in a case of this nature.

New York law is, of course, controlling in this case both on the question of liability and on the question of damages. The court below so ruled and noted that neither party disputed that fact (App. p. 41).

On the basis of New York law, the court below reversed the judgment of the District Court and dismissed the complaint. The court found it "unnecessary . . . to determine whether New York law recognizes a cause of action for refusal to settle under the circumstances" because there was "no showing that the insured suffered any loss" (App. p. 37); that "the law of New York requires proof of actual loss to support recovery for a tort of this type" (App. p. 43); and that "there has been no proof of damage" (App. p. 53). The court's conclusion rested upon a detailed and reasoned analysis of the arguments that might be presented to a New York state court. Each theory for dispensing with the settled New York principle that damages in tort compensate only for loss was carefully examined and rejected.

Because of its dismissal for lack of a showing of damage under applicable local law, the court below made no ruling on the liability question. It merely declared that "it is not clear whether New York would hold that Standard had violated its duty to the insured under the facts of the case" (App. p. 41, n. 5). These facts were that respondent was in no sense guilty of duplicity or deceit toward its insureds: it accepted trustingly their factual statements as to the circumstances of the accident (R. 124, 127, 133, 215, 216, 219); these statements strongly tended to exculpate the insureds (R. 127, 216, 218, 219, 27); respondent prepared their case diligently, defended them vigorously and harbored hope of success rationally (R. 6, 10-11, 79, 216, 80). Upon the facts and the applicable law of New York, the determination of the court below was manifestly correct.

Summary of Argument

Petitioner's submission satisfies none of the standards for discretionary review set forth in this Court's Rule 19, or derivable from its decisions and practice.

There is not any assertion that the decision below conflicts with any rendered by this Court or with any guarantee of basic fairness secured by the United States Constitution or implied in the nation's law.

There is no question here of nationwide importance, or even one of more restricted importance that arises under federal law. The federal bankruptcy laws do not come into play in any substantive respect. They serve only to define petitioner's status as a trustee in bankruptcy and to make the lower federal courts competent to hear his claim. No issue arises as to administration of the bankrupt's assets or allowance or disallowance of claims against his estate. Petitioner refers to no provisions of the Bankruptcy Act except Section 70(a), providing, so far as relevant, that he succeeds to the bankrupt's rights of action upon contract or for injury to property, a point absolutely undisputed and irrelevant here. Petitioner refers to no decisions construing the bankruptcy or any other federal statutes, or to any case of national common law.

In short, no issue touching the federal interest is presented.

There is solely and simply the question whether, assuming that under New York law the insureds were wronged by respondent, they have shown any damages under local law. The issue is narrow and rare, unlikely to recur. It presupposes the conjunction of (1) an insolvent insured who has contracted for insufficient coverage; (2) a seriously injured claimant with an overpowering case; and (3) a faithless insurer, tainted by fraud and bent on gambling

without rational hope of gain. Not often, respondent submits, will those unusual circumstances combine.

Moreover, petitioner asks this Court to review an application of the New York law of damages to a case in which the liability issue is left unresolved under local law by the court below. If this Court should grant review and thereafter reverse, there would ensue not a final adjudication, but a remand for decision of another issue of local law. Thus, the petition seeks review of an issue whose contrary determination in this Court would not necessarily alter the outcome of the case.

ARGUMENT

I.

There Is Not Any Basis For the Grant Of Certiorari

A. Solely state-created rights are involved.

The issue of New York state's law of damages presented by the petition is local, narrow, rare and vaporously light in the scales of this Court's national responsibilities. Petitioner's invocation of the words "bankrupt," "bankruptcy" and "trustee" cannot transform the nature of the issue, expand its scope, make it likely to recur, or elevate it to a matter of concern in national law.

The effect of the decision below is limited to New York law. The New York legislature may confirm or change any rule presently governing the respondent's or other insurer's obligations with regard to settling claims made in New York against policyholders on account of personal injuries arising from automobile accidents. (Indeed, at least five legislative efforts at change have been made in recent years, but without result, as will be shown below.) The New York state courts have like power to affect the rights and duties of insurance companies and their in-

sureds. This power reaches not only the question of whether and under what circumstances an insurer is liable to an insured for failure to settle within policy limits the claims made against him, but the measure of damages for breach of the duty as declared or defined.

Another state may differently perceive the desirable bases of liability or the measure of damages for violating the insured's rights. Such varying choices are the essence of the federal system. To make them infringes no federal power or interest, even when they apply to bankrupts.

Thus, New York Insurance Law, section 167, subd. 1 provides that the insurer is obligated to pay damages for injuries within the coverage limits of the policy even if the insured becomes insolvent. No one can doubt New York's constitutional power so to command. Nor would anyone doubt that if an injured person, such as Mrs. Van Suetendael, brought suit in a federal court to enforce directly the insurance company's obligation following the bankruptcy of the insured, only state rights and duties would be in question. If she were to go further and press a claim against the insurer for an amount in excess of its policy's limits, no alchemy would transmute the state issue into one of federal law. Then what is there here to bring a different result? Petitioner is driven to answer that it is purely and simply the circumstance that instead of Mrs. Van Suetendael her attorney, Mr. Harris, is urging her claim—but now in the garb of "trustee in bankruptcy" for her erstwhile adversaries, the Massellos.

Does the petitioner's new mantle change the applicable law? Heretofore he has not thought so, for his brief to the court below presented as its basic argument the point that the District Court's judgment was "in accord with the New York law" and the weight of other authority (none of which was federal in source).

Even here, the petitioner concedes indirectly that local law controls, for he criticizes the decision of the court

below as "probably in conflict with the New York state law as yet undeclared by the highest court of that State" (Pet. 16). That argument seems addressed to superseded, looser certiorari standards than those provided in this Court's Rule 19. Under the hardened tests for discretionary review embodied in the 1954 revisions of the Rules, the prerequisite is actual, not speculative, conflict with applicable local law decisions. See Wiener, "The Supreme Court's New Rules", 68 Harv. L. Rev. 20, 61 (1954).

Beyond that, even before its stricter standards were laid down, this Court had made clear that it would defer to the local law view of a federal court of appeals as a more expert tribunal on the laws of the states within its circuit. *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701, 707-708 (1949).

> "We have often had occasion to point out the importance to the orderly judicial administration of state laws in the federal courts that questions of state law required to be decided here should first be considered and decided by the state or federal court from which the case is brought to this Court for review. . . . When we are called upon to decide them, the expression of the views of the judges of those courts, who are familiar with the intricacies and trends of local law and practice, if not indispensable, is at least a highly desirable and important aid to our determination of state law questions. This Court will not ordinarily decide them without that aid where they may conveniently first be decided by the court whose judgment we are called upon to review." *Huddleston* v. *Dwyer*, 322 U. S. 232, 237 (1944).

The court below was unanimous that New York law governs the case.

B. No federal right or duty created by or under the bankruptcy laws is here to be administered.

As has been shown, the petitioner presumably concedes that his jurisdiction-conferring mantle as trustee in bankruptcy does not bring federal law into play to resolve the still undecided question of respondent's liability. Control of that issue he cedes by silence to New York law, agreeing, it may be assumed, that he can not mulct respondent for any damages unless he can point to a right of action created by New York state law. That is clearly so. Nowhere is it more true than in bankruptcy that the mere investiture of federal courts with jurisdiction to hear a claim does not bring federal substantive law into play to decide it. *National Mutual Ins. Co.* v. *Tidewater T. Co.*, 337 U. S. 582, 599 (1949); Hill, "The Erie Doctrine in Bankruptcy," 66 Harv. L. Rev. 1013, 1033 (1953). The Rules of Decision Act, 28 U.S.C. § 1652, commands application of local law to the issue of whether a cause of action exists; and also to the issue of damages raised in the petition. For it is unarguably clear that if local law creates the right it must also define its extent in damages. Thus, this Court has declared:

> "Whether and under what circumstances a reinsurer can be reached through a judgment against the insured are questions of local law." *Brilhart* v. *Excess Ins. Co.*, 316 U. S. 491, 497 (1942).

Austrian v. *Williams*, 198 F. 2d 697 (2d Cir. 1952), *cert. denied* 344 U. S. 909 (1952), makes perfectly plain the exclusively determinative role of state law in a case such as this. In *Austrian* the issue was whether a federal bankruptcy trustee, who had invoked federal jurisdiction by reason of that status, and who had established after trial a New York-based caused of action, was entitled to have its timeliness determined under federal law. It was held that New York law governed the duration of the cause of action, as it governed its existence. The same is true

here: New York law must determine whether a cause of action against respondent exists, and if so, in what amount of damages.

Petitioner cannot imbue the issue with a federal quality by promiscuous references to the petitioner's status as a bankruptcy trustee. There is no separate rule of bankruptcy, or any other federal law, applicable to the measure of damages in tort or contract for an insurer's failure to settle a personal injury claim. Cf. *National Mutual Ins. Co.* v. *Tidewater T. Co.*, 337 U. S. 582, 599 (1949).

C. There exists no conflict among the circuits on the issue presented.

No other Court of Appeals has passed on the issue here presented.

In no other case cited anywhere in these proceedings does it appear that the insured had been discharged in bankruptcy of all liability for the excess judgment before the time came to compute his damages for the insurer's wrongful conduct. That was precisely the situation here.

Even if there had been presented in some other federal court a case analogous to this one, its contrary decision of the issue would create only a spurious conflict among circuits. The reason is that the opposed determinations would merely reflect disagreement among the states over local rules of damage and liability in tort or contract cases, not a conflict in the interpretation of federal law. This Court's ruling on the damage issue would not serve in the least to set at rest the underlying state law disagreements.

To support his claim of inter-circuit conflict, petitioner points to two decisions in the Sixth Circuit (*Tennessee Farmers Mut. Ins. Co.* v. *Wood*, 277 F. 2d 21 (1960), and *Shambs* v. *Fidelity and Casualty Co.*, 259 Fed. 55 (1919)) and one in the Fourth Circuit (*Lee* v. *Nationwide Mut. Ins. Co.*, 286 F. 2d 295 (1961)). None of these cases purports to, or does, apply federal law.

The *Shambs* case involved a bankruptcy trustee's claim against an insurer on the latter's $5,000 liability policy covering a surgeon, Dr. Fowler, who had been cast in a $10,000 malpractice judgment. The insurer resisted the trustee's suit for the $5,000 coverage (*not* for the excess judgment) on the ground that the insured had paid only $200 to the judgment creditor, but the court rejected that contention, finding that under the terms of the insurance contract payment by the insured was not a prerequisite to the insurer's obligation. That case endorses exactly the rule which the New York Insurance Law embodies, namely, that the insurer must make good the amount of its policy's coverage even though the insured himself has not paid, and cannot pay, that amount because he is insolvent. New York Insurance Law, section 167, subd. 1. Petitioner's brief (pp. 18-19) may inadvertently convey an inaccurate impression of the *Shambs* case by its incorrect statement that the insurance company "refused to pay the amount of the judgment" ($10,000). *Shambs* holds merely that the insured's insolvency does not relieve the insurer of its contract obligation; not that it must pay, as tort damages, the amount of an excess judgment from which the insured has been relieved by a discharge in bankruptcy.

In each of the two other "conflicting" cases, the insured was solvent before the insurer's obligation to him arose and the court's determination against the faithless defendant restored him to the same condition by satisfying the wrongfully induced personal injury judgment.

Even if, contrary to respondent's submission, the decision below were at odds with the decisions cited by petitioner, the differences would not create a reviewable conflict. This Court has declared (*Rabbitt v. New York Life Ins. Co.*, 304 U. S. 202, 206 (1938)):

> "As to questions controlled by state law, however, conflict among the circuits is not of itself a reason for granting a writ of certiorari. The conflict may be

merely corollary to a permissible difference of opinion in the state courts."

This Court does not, we submit, grant its discretionary writ to review irresoluble differences among the local laws of New York, Tennessee, California and other states.

II.

The Decision Below Is Clearly Correct

Since New York law controls the issue presented, the views of the court below will not without most cogent reason be subjected to discretionary review. This Court has frequently declared its respect for the considered views of federal courts of appeals as those of expert tribunals on the laws of states within their circuits:

> "It would be wholly unprofitable for us to analyze Illinois cases on the point here urged. It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contentions. Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals' holding on a question of state law." *Estate of Spiegel v. Commissioner*, 335 U. S. 701, 708 (1949).

See also, *United States v. Durham Lumber Co.*, 363 U. S. 522, 527 (1960); *Appalachian Power Co. v. American Ins. Assn.*, 4 L. ed. 2d 30, 32 (1959) (opinion in chambers).

It is true that the New York courts have not ruled squarely on the issue presented. Thus, any decision here must be in some measure conjectural. It being clear that the result reached below is far from unreasonable in the light of relevant New York law and decisions, this Court should not add its conjecture to that necessarily indulged in by the court below as to an issue which ultimately rests with the highest court of New York.

Here, self-denial can be exercised with high confidence.

Stripped of its superstructure, this case involves an attempt by the petitioner as bankruptcy trustee to obtain for his personal injury client the $89,000 unpaid on her state court judgment. To deny recovery of this amount from an insurer which has already paid the full $10,000 amount on which it received premiums is entirely in harmony with New York law. New York has never recognized any channel of liability running from respondent to Mrs. Van Suetendael with respect to the part of her judgment exceeding the $10,000 limit of respondent's policy. As to the $10,000 limit, the Insurance Law makes it clear that there is such a channel of liability, that it courses through the insured, and that his insolvency or bankruptcy does not interrupt its flow. New York Insurance Law, section 167, subd. 1. No comparable provision or court decision gives Mr. Van Suetendael a right of action, direct or indirect, against the insurer for any damages to her exceeding the limits of the latter's policy.

Thus, it is clear that the personal injury claimant has no direct right of her own to the recovery. It is also quite plain that there is no theory sanctioned in New York that will allow the recovery indirectly through the insured.

We begin with the basic damage principle in New York:

> "It is a fundamental rule that one seeking to hold another liable for neglect to perform some duty or obligation must show that the neglect has resulted in some loss or injury and as the result thereof certain damages have been suffered." *McMechan* v. *Mass. Bonding & Ins. Co.*, 232 N. Y. 199, 204 (1921).

The court below, drawing on New York authorities, aptly said:

> "The law of New York requires proof of actual loss to support recovery for a tort of this type. The purpose of tort damage is to compensate an injured person

for a loss suffered and only for that. The law attempts to put the plaintiff in a position as nearly as possible equivalent to his position before the tort. . . ." (App. p. 43)

The court below then carefully analyzed and rejected various theories on which a finding of damages to petitioner might be sustained. It would serve no purpose to repeat the court's reasoned conclusions here, since they appear in the appendix to the petition at pages 43-53. Their gist is that, since the insureds were insolvent before entry of the excess judgment, were discharged of liability under that judgment before the District Court attempted to compute their damages, and made no attempt to prove actual injury, they sustained no compensable damage.

Nothing in New York law quarrels with that conclusion. Good sense, reason and analogy sustain it. This is not an occasion for discretionary review.

> "Where the lower federal courts are applying local law, we will not set aside their ruling except on a plain showing of error." *Palmer* v. *Hoffman*, 318 U. S. 109, 118 (1943).

To the same effect is *United States* v. *Durham Lumber Co.*, 363 U. S. 522, 527 (1960).

The decision below is correct also on the ground not reached by the Court of Appeals: New York law affords no basis for holding respondent liable. The New York Court of Appeals has made it plain in decisions that go back to 1915 that an insurance company in respondent's position is not liable for a failure to settle within policy limits even though later events prove that settlement would have spared the insured an excess liability. *Schenck Piano Co.* v. *Philadelphia Casualty Co.*, 216 N. Y. 662 (1915); *Auerbach* v. *Maryland Casualty Co.*, 236 N. Y. 247

(1923); *Streat Coal Co.* v. *Frankfort Gen. Ins. Co.*, 237 N. Y. 60 (1923); *Best Building Co.* v. *Employers' Liab. Assur. Corp.*, 247 N. Y. 451 (1928).

Since 1928, when the *Best* case was decided, the law on this subject has been so well settled and so well understood that the New York state Court of Appeals has not had occasion to pass upon the point. Even in the lower courts the question has rarely arisen. *Garcia & Diaz, Inc.* v. *Liberty Mutual Insurance Co.*, 147 N. Y. Supp. 2d 306 (Sup. Ct. 1955).

From time to time the New York decisions have said that an insurer can be liable for acting in "bad faith", a term they have repeatedly equated with "fraud." But it is most significant that the state Court of Appeals has never upheld a judgment for excess liability against an insurer on the ground of refusing to settle within policy limits.

In literally its latest words on the question at bar, the highest court of New York has said if an insurance company is to be liable under any given circumstances for failure to settle a personal injury claim against its insured, it must be by reason of the terms of the insurance contract, or by action of the legislature. *Best Building Co.* v. *Employers' Liab. Assur. Corp.*, 247 N. Y. 451, 455 (1928). In the *Auerbach* case, even though the complaint's allegations, charging bad faith in explicit terms, had to be accepted as true, the state Court of Appeals held (236 N. Y. at p. 253):

> "The insurance company, in refusing to settle the actions, did what it had the legal right to do under the terms of the policy."

Five times in recent years, the New York legislature has had before it bills which would lay down more detailed and stricter rules of liability on this subject. None has been enacted. 1937: A. Int. 2506, Pr. 3160, S. Int. 2040, Pr. 2587; 1948: S. Int. 1301, Pr. 1353, A. Int. 1523, Pr. 1568;

1950: A. Int. 43, Pr. 43, S. Int. 173, Pr. 173; 1951: A. Int. 1786, Pr. 1836; and 1952: A. Int. 1270, Pr. 1289.

In view of the foregoing, it seems not unlikely that, had the court below reached the issue of respondent's liability, it would have held that New York law would require resolution of that issue in respondent's favor.

In respondent's submission, it is in any event clear that under applicable local law the Court of Appeals correctly concluded that the record affords no basis for petitioner's claim of damages.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted.

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March 22, 1962.